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Victims' Rights Amendment: A sketch of a Proposal in the 108th Congress to Amend the United States Constitution

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Summary

Thirty-three states have added a victims' rights amendment to their state constitutions. S.J.Res. 1 (Sens. Kyl and Feinstein)/H.J.Res. 10 (Rep. Royce)/H.J.Res. 48 (Rep. Chabot) would add a victims' rights amendment to the United States Constitution. The Senate Judiciary Committee has reported the measure without amendment and at least initially without a written report. The President has endorsed the Amendment as he had in the 107th Congress (S.J.Res. 35/H.J.Res. 88/H.J.Res. 91). Similar proposals date back to the 104th Congress.

The Amendment grants the victims of state and federal violent crimes the right (1) to reasonable and timely notice of public proceedings relating to the crime; (2) to reasonable and timely notice of the release or escape of the accused; (3) not to be excluded from such public proceedings; (4) reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and (5) to adjudicative decisions that give due consideration to victims' interests in their safety, in avoiding unreasonable delay and to consideration of their just and timely claims for restitution from the offender. The rights may not be restricted except to the extent dictated by a substantial interest in public safety or the administration of criminal justice or by compelling necessity. Only victims and their representatives may enforce the rights, but they may not do so through a claim for damages or request to reopen a completed trial. Congress is otherwise empowered to enact legislation for the Amendment's enforcement. The proposed Amendment is the product of efforts to reconcile victims' rights, the constitutional rights of defendants, and prosecutorial prerogatives. The hearings on past proposals and three Senate Judiciary Committee reports (S.Rept. 105-409; S.Rept. 106-254; S.Rept. 108-191) provide insight as to the intent of language used and proposed language implicitly rejected. Proponents and their critics disagree over the need for the Amendment, its meaning, its propriety, its costs, and its effect on federalism. This is an abridged version of CRS Report RL31750, *Victims' Rights Amendment: A Proposal to Amend the United States Constitution in the 108th Congress*,.

Introduction. A victims' rights Amendment to the United States Constitution has been introduced in three essentially identically worded resolutions in the 108th Congress: S.J.Res. 1 (Sens. Kyl and Feinstein), H.J.Res. 10 (Rep. Royce), and H.J.Res. 48 (Rep. Chabot). The Senate Judiciary Committee has reported the measure without amendment, S.Rept. 108-191 (2003). The Amendment is likewise identical to one which the President endorsed during the 107th Congress, but is substantially different in word if not in spirit from proposals offered as back as the 104th Congress. Consequently, the committee hearings and reports on its antecedents help to provide context for the Amendment in its current form.

Pro and Con. Arguments put forward in support of an amendment include: (1) the criminal justice system is badly tilted in favor of criminal defendants and against victims' interests and a more appropriate balance should be restored; (2) existing statutory and state constitutional provisions are wildly disparate in their coverage, resulting in uneven treatment and harmful confusion throughout the criminal justice system; (3) the drafters of the Constitution did not include a victims' rights provision because at the time victims enjoyed greater rights to participate in the prosecution of offenders than is now the case, and some restoration is in order; and (4) existing state and federal laws are inadequate and likely to remain inadequate.

Critics argue to the contrary that (1) the criminal justice system is not out of balance; misguided interjection of victim participation threatens to render the process inaccurate, and unfair; (2) unless it preempts all existing state provisions, the proposed Amendment would simply exchange one patch work of victims' rights law for another; (3) the extent of victim participation in public prosecutions at the time the Constitution was ratified has been overstated; (4) the proposed Amendment is inconsistent with the principles of federalism.

Preemptive and Amendment Impact. The United States Constitution is the supreme law of the land. When it is said that nothing in victims' rights edicts created by statute or state constitution imperils defendants' rights under the United States Constitution, that is correct; nothing could. But an amendment to the United States Constitution stands on different footing. It amends the Constitution. Its very purpose is to make constitutional that which would otherwise not have been. It may subordinate defendants' rights to victims' rights or subordinate victims' to defendants' rights. It may subordinate either, both, or neither to prosecutorial discretion. It may require any conflicting law or constitutional precept, state or federal, to yield. Even in the absence of a conflict, it may preempt the field, sweeping away all laws, ordinances, precedents, and decisions – compatible and incompatible alike – on any matter touching upon the same subject. Whether it does so or to what extent it does so is a matter of interpretation. That is, what is its intent? What does it say? What is its purpose? What does its history tell us?

The questions are most vexing when an apparent conflict exists between state and federal law or among the rights and prerogatives of victims, defendants and prosecutors. The interpretative principles of preemption triggered by an apparent conflict between state and federal law are fairly well developed. "[P]reemption of state law [may occur] either by express provision, by implication, or by a conflict between federal and state law. And yet, despite the variety of these opportunities for federal preeminence, [the Court has] never assumed lightly that Congress does intends to supplant state law. Indeed, in cases . . . where federal law is said to bar state action in fields of traditional state regulation, [the Court has] worked on the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Conversely, by virtue of the Supremacy Clause, where the subject matter is one which the Constitution relegates to the federal domain, the vitality of state law is dependent upon the largess of Congress and the Constitution.

A victims' rights amendment to the United States Constitution that relegates the area to the federal domain, confines state authority to that which the amendment permits or allows Congress

to permit. Few advocates have explicitly called for a "king-of-the-hill" victims' rights amendment, but the thought seems imbedded in the complaint that existing law lacks uniformity. How else can universal symmetry be accomplished but by implementation of a single standard that fills in where pre-existing law comes up short and shaves off where its generosity exceeds the standard? Yet the recent history of the Amendment indicates that advocates intended to establish a minimum rather than a uniform standard.

Questions of the Amendment's impact on the rights afforded the accused may be even more difficult to discern. The principles of construction called into play in the case of a conflict between a victims' rights amendment and rights established elsewhere in the Constitution are similar to those used to resolve federal-state conflicts.

Intent of the drafters is considered paramount, but the courts will make every effort to reconcile apparent conflicts between constitutional provisions. In the case of unavoidable conflict between provisions of equal dignity, the latest in time prevails. If there is an unavoidable conflict between a right granted by an adopted victims' rights amendment and some other portion of the Constitution, the most recently adopted provision will prevail. Proposals in the 106th Congress came to naught over the issue of defendants' versus victims' rights.

Victims' Rights v. Defendants' Rights. Defendants' rights and prosecutors' prerogatives have been the twin Achilles' heels of past victims' rights proposals. The challenge has been to strike a balance between the rights of victims and defendants without impinging on defendants' rights or hamstring law enforcement efforts; to deny defendants' rights trump status without denying the defendants their rights or jeopardizing prosecutorial prerogatives.

Victims of Crime. The Amendment creates rights for the victims of violent crime. Its scope turns on the definition of victim, on the definition of violent crime, and on the jurisdiction whose proceedings and decisions the Amendment governs. The Amendment's authors apparently anticipated application at a minimum to individuals or legal entities victimized by crimes of physical force used or threatened against their person or property. On its face the Amendment would appear to apply with respect to proceedings involving a crime – federal, state, territorial or tribal; civilian or military – but probably not with respect to juvenile proceedings under any of those authorities.

Right to Notice. Notice in the world of victims' rights takes three forms, notice to the victim: (1) of his or her rights, (2) of the status of the criminal investigation and prosecution, as well as the time, place, and outcome of related judicial proceedings, and (3) of the release or escape of the accused or convicted offender. Notice allows victims to assert their rights, facilitates their participation, assures them that justice is being done, and affords them the opportunity to take protective measures. The Amendment does not include a right to notification of the Amendment's benefits. Its provision for notification of release or escape applies only prior to conviction, *i.e.,* only with respect to the release or escape of *the accused.* It does, however, entitle victims to reasonable and timely notice of all public proceedings involving the crime.

Right Not to Be Excluded. The Amendment assures victims of the right not to be excluded from any public proceedings involving the crime. It is one area where balancing the interests of victim, defendant, and government may be most challenging. The right brings with it no auxiliary right to transportation to such proceedings, a companion that might accompany a right to attend. It applies to only those functions that qualify as official "proceedings." And it operates only with respect to those proceedings that are "public."

Right to Be Heard. The right to be heard is a right to participate. The Amendment describes the proceedings at which it may be invoked with greater particularity. Although victim impact

statements are a common sentencing feature, victim participation elsewhere varies considerably from jurisdiction to jurisdiction and according to the stage of the process at issue.

The Amendment affords victims the right "to be heard at public release, plea, sentencing, reprieve, and pardon proceedings" subject to a rule of reason. It does not on its face give them the right to be heard in closed proceedings or to be heard on other pre-trial motions, at trial, perhaps on appeal, or with respect to related forfeiture or habeas proceedings. The history of past, more narrowly drawn provisions indicates that the right may embrace all of these and more.

Due Consideration for Victim Safety. The Amendment identifies three victims' interests that adjudicative decision makers must take into consideration: victim safety, avoiding unreasonable delay, and just restitution pursued in a timely manner. The legislative history to date may be read to indicate that the drafters understood the right to attach to decisions made by judicial and administrative decision makers in any adversarial setting. Victims' interests must be considered, but are not necessarily controlling.

In the case of victim safety, the decision whether to release an accused on bail and the conditions to be imposed upon release represent perhaps the obvious example of decisions where victims' safety must be considered. The right does not attach if the decision to release the offender is simply a matter of administrative discretion exercised without the necessity of an adversarial proceeding. Thus, the right only attaches – with respect to release of an offender following full service of his or her sentence, or on furlough, or work release, or assignment to a half-way house, or from civil commitment forum – if the jurisdiction provides for release pursuant to an adversarial proceeding. The right does not attach, for instance, to release pursuant to a presidential pardon that features no such proceedings. The range of proceedings where the right applies may be broader than past proposals envisioned since those were limited to decisions concerning "conditional release."

Speedy Trial. The second of the victims' interests that must be considered by at least some decision makers is consideration of the victim's interest in avoiding unreasonable delay. Some have expressed the concern that this vests victims with the right to be heard on scheduling decisions and consequently the right to notification and appearance at proceedings where such matters are raised. The concern may be unfounded in light of the Amendment's specific references to points of attachment of a victim's right to notice, not to be excluded, and to be heard. The legislative history suggests that perhaps the standards used to judge the defendant's constitutional right to a speedy trial govern here as well.

Restitution. The third victim interest entitled to consideration under some circumstances involves consideration of restitution claims. The Amendment is very different from past proposals. It does not establish a right to restitution in so many words. It does not explicitly convey a right to have proceedings reopened for failure to accommodate a victim's right to restitution. Instead for the first time it speaks of just and timely claims to restitution, two concepts which could be subject to several interpretations.

Legislative Authority. Section 4 vests Congress with the power to enforce the Amendment through appropriate legislation. Although the legislative history suggests broader authority, subject to Congress' pre-emptive legislative prerogatives, the state legislatures share with Congress the authority within their own domains to restrict victims' rights in the name of a substantial interest in public safety or the administration of criminal justice or in response to a compelling necessity.

Enforcement. Section 4 of the Amendment empowers Congress to enact legislation to facilitate its enforcement. Section 3 insists that only victims and their representatives may seek to enforce rights under the Amendment; those accused of the crime may not. The relief available may not

include a claim for damages or the right to have completed trials reopened to vindicate victims' rights. Other sections color the relief available by circumscribing the Amendment's right to notice and to be heard with a rule of reason and by allowing federal and state executive, legislative and judicial branches to restrict victim's rights in the face of substantial interests in public safety or the administration of criminal justice or when faced with compelling necessity. The history of the Amendment raises some question of the extent to which indigent victims would be entitled to the assistance of appointed counsel to assert their rights.

Effective Date. The Amendment goes into effect 180 days after ratification by the states. There is some question whether the Amendment applies to all proceedings and decisions occurring after the effective date or only to those involving crimes occurring after the effective date.

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